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SUPREME COURT OF THE UNITED STATES

October Term 1971

No. _____

PAUL E. ENYART, Bankrupt
PAUL E. ENYART - - - - - Petitioner

versus

ASHLAND DISCOUNT COMPANY
JOHN SIMPSON, Trustee - - - Respondents

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
I. Opinions Below	1
II. Jurisdiction	1
III. The Questions Presented	2– 3
IV. Statutes Involved	3– 4
V. The Material Facts Constituting the Case	4– 6
VI. Argument	6–10
VII. Conclusion	10–11
Proof of Service	12
Appendix	13–38
Findings of Fact and Conclusions of Law	13–33
Memorandum Opinion	34–38

TABLE OF AUTHORITIES

Table of Cases

	PAGE
Burchett v. Meyers, C.A. Nev. 1953, 202 Fed. 920....	9
Hedges v. Bushnell, C.C.A.N.M. 1939, 106 F. 2d 979..	6, 8
In re Bellis, D.C. N.Y. 1870, Fed. Cas. No. 1,275.....	9
In re Marx, C.C.A. 1942, 125 F. 2d 335.....	8
In re Underhill, C.C.A. N.Y. 1936, 82 F. 2d 258.....	9
Noroian v. Hern, C.A. Cal. 1970, 422 F. 2d 1092.....	9
Royal Indemnity Co. v. Cooper, C.C.A. 1928, 26 F. 2d 585. . .	9

Statutes

Title 28 U.S.C. 1254(1). . .	1
Title U.S.C. 45(c). . .	1
11 USC 32(b). . .	3, 7, 8, 10
11 USC 32(c)(2). . .	3- 4
11 USC 32(c)(7). . .	4
11 USC 32(c). . .	8, 9, 10

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PETITION FOR WRIT OF CERTIORARI

May it please the Court:

I. OPINIONS BELOW

This is a Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, judgment made and entered May 1, 1972. Copies of the Referee in Bankruptcy's Order, the memorandum opinion of the District Court, and the opinion of the United States District Court of Appeals for the Sixth Circuit are appended hereto.

II. JURISDICTION

The jurisdiction of the Court is based upon Title 28 U.S.C. 1254(1) and Title U.S.C. 45(c).

III. THE QUESTIONS PRESENTED

Does the statutory requirement that the bankrupt maintain books or records from which his financial affairs might be ascertained require the availability of records in accordance with good bookkeeping practice on the filing date of the Bankruptcy Petition?

Wherein the bankrupt's records were not compilated for four (4) years prior to filing the Bankruptcy Petition, did the procedure for adjudiciating the issue raised on Objections to Discharge provide the bankrupt a reasonable opportunity to be fully heard, where there was no request by the Referee, the Trustee or the Objecting Creditor for the production or inspection of records or any demand made for compilation of the same until after the first hearing on the Objections to Discharge excepting the Order directing the production of records for six (6) months immediately preceding the filing of the Bankruptcy Petition.

Was the procedure for adjudicating the issue raised on Objections to Discharge consistent with the bankrupt's right to be fully heard on the issue wherein after the initial hearing on the objections the bankrupt immediately engaged a CPA to compile his records into books of account in accordance with the Referee's requirement, but the CPA needed an additional forty-five (45) days to complete the compilation, which the Referee denied?

Was the procedure for adjudicating the issue raised on Objections to Discharge fair and orderly and in compliance with General Orders in Bankruptcy, Order 32, where the Trustee, who did not object to the suf-

ficiency of the bankrupt's records, and who did not file Objection to Discharge was allowed to challenge the sufficiency of the records in a brief to the Referee and to the Court of Appeals.

IV. STATUTES INVOLVED

11 USC 32(b):

> After the bankrupt shall have been examined, either at the first meeting of creditors or at a meeting specially fixed for that purpose, concerning his acts, conduct, and property, the court shall make an order fixing a time for the filing of objections to the bankrupt's discharge, notice of which order shall be given to all parties in interest as provided in section 94 of this title. Upon the expiration of the time fixed in such order or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard.

11 USC 32(c)(2):

> The court shall grant the discharge unless satisfied that the bankrupt has destroyed, mutilated falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts

or failure to have been justified under all the circumstances of the case.

11 USC 32(c)(7):

The court shall grant the discharge unless satisfied that the bankrupt has filed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: *Provided,* That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt.

Order 32. General Orders in Bankruptcy:

Any person opposing a discharge shall, on or before the time fixed for the filing of objections to the discharge, file a specification in writing of the grounds of his opposition.

V. THE MATERIAL FACTS CONSTITUTING THE CASE

The Bankrupt filed a voluntary petition in Bankruptcy in the United States District Court for the Eastern District of Kentucky on December 2, 1968.

The Bankrupt was insolvent, bankrupt and excessively indebted to the Objecting Creditor in 1964 due to gross mismanagement by his partner.

The Bankrupt after 1964 failed to maintain adequate compilations of his records, to the extent of

failure to file income tax returns for 1964-1968.

The Bankrupt was directed to produce at the first meeting of creditors records for six (6) months immediately preceding filing of the petition in bankruptcy.

There were four (4) hearings, including the First Meeting of Creditors prior to the filing of Objections to Discharge by the finance company.

At the four (4) hearings the bankrupt was not asked to produce any record for inspection nor ordered to produce compilated records. The Referee, the Trustee and the Creditor knew the bankrupt had failed to file income tax returns, and no complaints or demands were made concerning the same.

After filing of the Objections by the finance company there was still no request or demands made of the bankrupt in regards to his records.

At the initial hearing on the Objections to Discharge the Referee required the bankrupt to compile his records. To this end a Certified Public Accountant was engaged and testified at the next scheduled hearing that the bankrupt's records were logically arranged, and that the basic records necessary to complete the bookkeeping process had been preserved.

The bankrupt was financially distraught. His records were complicated and extensive. One request was made in regards to his records; namely, the Order accompanying the Notice of the First Meeting of Creditors. The Certified Public Accountant needed forty-five (45) additional days to prepare the compilation required by the Referee after the first hearing on the Objections to Discharge.

The Referee denied the request for a continuance, made prior to the next scheduled hearing on the Objections to Discharge.

The four (4) hearings prior to the October hearing on the Specification's of Objections to Discharge were not related to the adequacy of bankrupt's records.

VI. ARGUMENT

The record keeping requirement of the Bankruptcy Act was designed to enable a creditor to learn and discover the financial affairs of the bankrupt. Hedges v. Bushnell, C.C.A.N.M. 1939, 106 F. 2d 979.

The significancy of this case is that it focuses critically on a fallacy worthy of rejection, namely, the record keeping requirement was not intended to require bookkeeping for bookkeeping's sake but to enable creditors to know the business transactions of the bankrupt.

The Creditor and Trustee in this case never demanded production or inspection of any record nor a compilation of his records to investigate the affairs of the bankrupt.

In the state court, the Objecting Creditors filed a foreclosure proceeding which initiated the bankruptcy petition, and in the state court proceedings, the bankrupt counterclaimed against the Objecting Creditor for misrepresentation and over-reaching.

The bankrupt was financially distraught. His records were complicated and extensive. He had been engaged primarily in the used car business. There were numerous and extensive transactions. Without

any specific demand as to what records and what time periods the Objections Creditor was interested, the bankrupt was placed in an impossible position to respond to the general charge that he failed to maintain books or records from which his financial transactions might be ascertained.

Was it reasonable to expect the bankrupt to employ a CPA to organize his records for the previous four (4) years into books of account in the absence of any requests or inquiries along these lines?

The bankrupt explained to the Referee that he did not know what records the Objecting Creditor wanted. The Referee responded that the bankrupt should have known what good bookkeeping practices were.

The Objecting Creditor questioned that bankrupt at the first hearing on Objection to elicit information requiring books of account covering the years 1965-1968.

The CPA at the next hearing testified that the bankrupt had the basic supporting records necessary to complete the bookkeeping process.

The Objecting Creditor substantially completely financed the bankrupt's used car business, made regularly scheduled inventory checks, and was otherwise thoroughly familiar with the financial transactions of the bankrupt.

The procedure countenanced by the Court below was inconsistent with the right of the bankrupt to be fully heard on the issue. 11 U.S.C. 32(b).

The procedure countenanced by the Court below infringed Order 32, General Orders in Bankruptcy, substantially prejudicial to the bankrupt's right to a fair hearing.

The Referee required the availability of records in accordance with good bookkeeping practice.

The District Court in his opinion took note of the CPA's testimony that it would probably be possible to make a reconstruction of the bankrupt's affairs if the objecting Creditor's records were made available to the bankrupt.

The Court of Appeals in its opinion approved records if a competent accountant could reconstruct the records without expending unlimited amounts of time and money.

There are numerous decisions in the Circuit Courts of Appeals involving the interpretation of 11 U.S.C. 32(c). The question arises frequently and poses much difficulty.

Counsel for the bankrupt has been unable to find where this Court has decided a case involving the interpretation of 11 U.S.C. 32(c), General Order 32 and procedures relating thereto implementing 11 U.S.C. 32(b).

The tests vary from case to case.

> Records should show losses and gains and present a satisfactory explanation of receipts and disbursements.
>
> In re Marx, C.C.A. 1942, 125 F. 2d 335.

> It is enough if the records sufficiently identify the bankrupt's business transactions to permit intelligent inquiry respecting same.
>
> Hedges v. Bushnell, C.C.A. N.M. 1939, 106 F. 2d 979.

If a competent accountant can, from an examination of the books produced and in the possession of the trustee, determine the true financial condition of the debtor, they are sufficient to justify granting him a discharge.

In re Bellis, D.C. N.Y. 1870, Fed. Cas. No. 1,275.

Where the bankrupt is involved in many transactions of an extensive character, a substantially accurate and complete record of his affairs is essential to his discharge.

In re Underhill, C.C.A. N.Y. 1936, 82 F. 2d 258.

Records or books are sufficient so long as it is possible to ascertain bankrupt's financial condition and business transactions.

Burchett v. Meyers, C.A. Nev. 1953, 202 Fed. 920.

Records are inadequate if a competent accountant would be unable to determine the bankrupt's financial condition from his books and records.

Noroian v. Hern, C.A. Cal. 1970, 422 F. 2d 1092.

The language of 11 U.S.C. 32(c)—"to keep or preserve books of account or records from which his financial condition and business transactions might be ascertained"—should be interpreted according to its plain meaning.

The statute clearly requires granting the discharge if on even balance it is possible that the records are adequate. The Bankruptcy Act is remedial legislation and should be liberally construed in favor of the bankrupt. Royal Indemnity Co. v. Cooper, C.C.A. 1928, 26 F. 2d 585.

The Referee in the instant case viewed the statute as requiring the availability of adequate records as of the date of filing the bankruptcy petition.

The District Court noted that the testimony of the CPA indicated that it was probably possible to reconstruct the financial affiars of the bankrupt, but nonetheless affirmed the Referee's order.

The Court of Appeals affirmed the order denying discharge stating that there was some limit of time and money beyond which a bankrupt cannot be extended the privilege of reconstructing his records to prove he maintained the same as required by 11 U.S.C. 32(c).

These views are not uniform, and are closely interlocked with the questioned propriety of the procedure which deprived the bankrupt of his right to be fully heard on the adequacy of the records to reflect his financial affairs 11 U.S.C. 32(b).

The bankrupt is entitled to know which parties are objecting to his discharge. The Trustee did not file a Specification of Objections to Discharge, General Order 32, and was not entitled to brief the Referee and the Court of Appeals on the issues raised in the Objecting Creditor's specifications.

VII. CONCLUSION

In conclusion, it is respectfully submitted that the bankrupt was not afforded a reasonable opportunity to be fully heard on the issue relating to the adequacy of his records and further that the Referee in Bankruptcy, the District Court, and the Court of Appeals' interpretation of 11 U.S.C. 32(c) were not consistent.

Wherefore, your Petitioner respectfully requests the Court to set aside the Order denying the Petitioner a Dicharge in Bankruptcy and for all further relief as may be proper.

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500 Price Building
Ashland, Kentucky 41101

Counsel for Petitioner

PROOF OF SERVICE

I, Michael R. Dowling, attorney for petitioner herein, hereby certify that on this 28th day of July, 1972, three copies of the Petition for Writ of Certiorari were mailed first class, postage prepaid, to Joe R. Massey, Jr., Ashland Discount Company, Inc., 203 Kitchen Building, Ashland, Kentucky 41101; John Simpson, Trustee, 2024 Winchester Avenue, Ashland, Kentucky 41101; and James E. Adkins, 2813 Louisa Street, Catlettsburg, Kentucky 41129, Attorney for Trustee. I further certify that all parties required to be served have been served.

Michael R. Dowling

MICHAEL R. DOWLING

APPENDIX

[CAPTION]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—

(Filed November 5, 1970)

This case is pending on specifications of objections to discharge of the bankrupt filed herein by Ashland Discount Company, Inc., by counsel. The grounds of objection to discharge are (1) that the bankrupt failed to keep or preserve books of account or records from which his financial condition and business transactions might be ascertained; (2) that the bankrupt, within the year immediately preceding bankruptcy, transferred, removed, destroyed or concealed some of his property with intent to hinder, delay or defraud his creditors, and (3) that the bankrupt has failed to explain satisfactorily losses of assets or a deficiency of assets to meet his liabilities. Five separate hearings, in addition to the first meeting of creditors, have been held in the matter and the transcripts of all these hearings have been made a part of the record in support of the specifications of objections to discharge (Transcript of Testimony, October 9, 1969, pp. 66-67; 77).

Findings of Fact:

The bankrupt filed a voluntary petition in bankruptcy in the United States District Court for the Eastern District of Kentucky at Catlettsburg, Kentucky, on December 2, 1968. He listed liabilities of $195,671.10 and assets of $108,918.69. The statement of affairs to the petition reveals that a few months prior to bankruptcy the bankrupt was engaged in the used car business under the name of Paul Enyart, d/b/a Ashland Recovery, 1001 Winchester Avenue, Ashland, Kentucky, and also operated a hobby shop under the name of Model Raceway, 2100 29th Street, U. S. 23, Russell, Kentucky. According to the statement of affairs both of these businesses were terminated in June of 1968. The statement of affairs also reveals that in August, 1968,

the bankrupt sold a mobile home to Mary Walker, Ice Dam Hollow, Catlettsburg, Kentucky, for $3900. In October of 1968 he sold a mobile home to W. I. Cooper of Garrison, Lewis County, Kentucky, for $2200, and on November 20, 1968, he sold two mobile homes to Kenneth Tufts and Ronald Morrison of Westwood, Ashland, Kentucky, for $3500, of which $2850 was paid to Third National Bank of Ashland, Kentucky, in satisfaction of a loan secured by a security interest in the mobile homes. According to the statement of affairs the profit from the sale of the first two mobile homes was used to purchase parts and supplies for trailer repairs and for miscellaneous living expenses. There is no explanation as to the disposition of the $650 profit derived from the sale of the last two mobile homes two weeks prior to bankruptcy. Likewise, the statement of affairs makes no reference to the transfer of a 1969 Holiday Traveler Travel Trailer to the bankrupt's brother, Clifford Enyart. This trailer was brought into Kentucky on November 21, 1968, according to an affidavit supporting a license application for the vehicle. The application was signed by Clifford Enyart and notarized by the bankrupt, Paul Enyart. According to the testimony of the bankrupt, subsequent to the termination of the used car and hobby shop businesses in which he had been engaged, he earned his livelihood buying and repairing damaged trailers and reselling them for profit.

The bankrupt is an experienced businessman. In 1948 he was employed as a collection man in the field for a loan company, and in 1951 became manager of a small loan company office. He served in that capacity four years. He operated a small furniture business at Wurtland, Kentucky, for one and a half years. He has been in business for himself since 1960 (Transcript of Hearing, Dec. 10, 1969, pp. 45-46).

On or about January 1, 1964, he and Challie Yates, Jr., began operation of a used car lot in partnership under the

name of Ashland Recovery Service, 1001 Winchester Avenue, Ashland, Kentucky. Prior to that they had carried on a similar business for two or three months under the name of Yates Auto Mart, 11th Street and Greenup Avenue, Ashland, Kentucky. The automobiles on these car lots were floor planned with the objecting creditor, Ashland Discount Company, and many of the conditional sales contracts for sale of automobiles were in turn purchased by Ashland Discount Company with recourse (Transcript of Hearing, Feb. 17, 1969, pp. 40-41). During 1964 they sold 25 to 30 cars a week and sold $600,000 worth of cars that year. However, sometime during the year Yates informed the bankrupt that they were "out of trust" and in trouble with Ashland Discount Company in that they had sold approximately $30,000 worth of floor planned cars and had not delivered the money for the cars to Ashland Discount Company. In order to correct this situation Yates and the bankrupt personally obligated themselves on a note to Ashland Discount Company for $30,000. Thereafter, the bankrupt and Yates severed their partnership arrangement (Id. 48-52).

At the end of 1964 the bankrupt took over the business of Ashland Recovery Service and began operation of a used car lot under that name at 347 13th Street, Ashland, Kentucky. Yates stayed at 10th Street (1001 Winchester Avenue) under the name of Yates Auto Mart. Ashland Discount Company agreed to split the $30,000 note they had signed and accept a $15,000 note from each of them in substitution therefor. [sic] (Id. 54).

In May of 1965 Yates got in trouble again at the 10th Street location. The bankrupt was still responsible for some of the floor planned cars which were in Yates possession. So the bankrupt took over the lot from Yates and continued in business at both locations (Id. 54-56).

It was determined as a result of an accounting between the parties that as of December 23, 1966, the bankrupt was indebted to Ashland Discount Company in the amount of

$42,332.03. On that date the bankrupt executed to Ashland Discount Company three notes evidencing this indebtedness, one for $15,332.03, one for $13,000, and one for $14,000, all bearing interest at the rate of 7% per annum and payable consecutively in installments. To secure payment of these notes the bankrupt and his wife executed to Ashland Discount Company a mortgage of even date on eleven parcels of real estate. Several of these tracts of real estate had been conveyed to the bankrupt by his mother and father to enable the bankrupt to obtain financing for his used car venture. Also, Challie Yates had conveyed his interest to the bankrupt in certain parcels of real estate in which they had owned a joint interest.

Also on December 23, 1966, the bankrupt and his wife executed to Ashland Discount Company a note for $100,000. This note was secured by a separate mortgage of even date on the same parcels of real estate executed for the purpose of securing Ashland Discount Company from any losses that might arise from transactions entered into with Paul E. Enyart, and/or Ashland Recovery, wherein the mortgage "has or may be required to purchase or otherwise acquire any notes, conditional sales agreements, trust receipts, chattel mortgages, financing statements, security agreements, or other obligations or choses in action, bearing the signature as maker, endorser, grantor, acceptor, assignor, or in any other capacity."

Likewise, on December 23, 1966, the bankrupt, Paul E. Enyart, d/b/a Ashland Recovery and Ashland Discount Company entered into a dealer agreement under which Ashland Discount Company agreed to purchase installment notes and conditional sales contracts for sale of automobiles, to bona fide purchasers, and also entered into an agreement concerning reserve accounts to be maintained by Ashland Discount Company with respect to the purchase of instruments evidencing such sales.

On December 23, 1966, the bankrupt d/b/a Ashland Recovery, executed to Ashland Discount Company a financing statement covering the inventory of motor vehicles of the bankrupt. It is not clear whether a security agreement was executed covering the inventory of motor vehicles. As further security the bankrupt, his wife and the bankrupt's mother and father on December 23, 1966, executed a guaranty agreement jointly and severally guaranteeing payment of instruments executed by Paul E. Enyart, d/b/a Ashland Recovery, as maker, endorser, guarantor, acceptor or assignor.

On June 25, 1968, the bankrupt's used car business was terminated with the sale of the entire stock of approximately 50 motor vehicles to Fletcher Ramey, d/b/a Ramey Motors, Chapmansville, West Virginia, for the sum of $32,300. This sale and purchase was apparently financed by Ashland Discount Company with appropriate credit given the bankrupt on his indebtedness to that company. On the date of bankruptcy the bankrupt was indebted to Ashland Discount Company in the sum of $64,883.62, of which $24,654.61 accrued subsequent to December 23, 1966, and is evidenced by the $100,000 note executed December 23, 1966. The balance of $40,229.01 is the amount remaining due on the three notes representing indebtedness which accrued prior to December 23, 1966.

The bankrupt, by counsel, has filed objections to the proof of claim of Ashland Discount Company and a counterclaim for $100,000, on the grounds "(1) That various and divers agreements, guarantees and mortgages set forth in the claimant's proof of claim were procured by misrepresentation, over-reaching and duress, and are unconscionable. (2) The claimant engaged in deliberate, intentional and unfair business practices in derogation of its contractual duties and responsibilities all to the great injury of the bankrupt. (3) The claimant failed to make an accounting to the bankrupt, specifically of the contingent reserve

and the matter of charging this reserve, of monies derived from the operation of Ashland Recovery." The Court by order dated February 10, 1969, reserved a ruling on this objection on the ground it is the duty of the trustee to object to claims, and that other parties may not do so unless they first establish for the record that demand has been made upon the trustee to file such objections and the trustee has failed and refused to do so. There is no such showing in the record in this case. Moreover, the counterclaim asserted in behalf of the bankrupt in connection with this objection to the proof of claim of Ashland Discount Company is in the nature of a right of action upon contracts which passed to the trustee in bankruptcy under Section 70a(6) of the Bankruptcy Act, 11 U.S.C. Sec. 110a(6), and the Trustee is not asserting any such right of action at this stage of the proceeding.

The materiality of the issues raised by this alleged counterclaim to the issues raised by the specifications of objections to discharge is questionable. Although it is not clear from the record, apparently there is some contention in behalf of the bankrupt that his failure to keep books and records and his inability to explain satisfactorily losses of assets or a deficiency of assets to meet his liabilities is attributable, at least in part, to the alleged conduct of the objecting creditor in allegedly failing to properly account for reserve funds as provided for in the contracts between the parties.

On March 5, 1968, the bankrupt entered into an agreement with Bill Reeves of Huntington, West Virginia, under the terms of which Reeves was to equip a Model Raceway to be located on U. S. 23, Russell Bypass, Russell, Kentucky. The agreement provided that title to all stock and equipment would remain in Reeves until paid for by the bankrupt. It was further provided by the agreement that so long as the bankrupt was using Reeves' equipment he would not purchase any stock through any other distributor than

Reeves. The equipment covered by this agreement was valued at $1070. The principal items were an 8 lane slot car tract—purchase price $500, and 8 timer American slot car timer priced at $100. The bankrupt closed the Model Raceway in June, 1968, after having been in the business only three or four months. Thereafter, Reeves repossessed the inventory and some of the items of equipment covered by the agreement between the parties (Transcript of Testimony, Oct. 9, 1969, pp. 33-34; Exhibit O to Transcript of Testimony, Mar. 10, 1969). (See also Transcript of Testimony May 27, 1969, pp. 44-62).

Prior to and subsequent to December 23, 1966, the bankrupt received rental income from several of the eleven parcels of real estate described in the mortgages executed on that date to Ashland Discount Company. As shown by these mortgage contracts, most of the parcels of real estate were subject to prior encumbrances. Also, as recited in the mortgage agreements most of these parcels of real estate were acquired by the bankrupt in 1964 and 1965. According to Item 5 of the statement of affairs the rental income per annum was as follows: 2104 Washington St., $660; 10 Senca St., $960; 309-311 7th St., $1200; 258 Winchester Ave., $360. At one time the bankrupt maintained a bank account in the name of Ashland Recovery Real Estate for the deposit of rent monies (Transcript of Hearing Dec. 10, 1969, p. 44).

Between June, 1968, when the bankrupt terminated his used car and Model Raceway businesses, and the date of bankruptcy, the bankrupt engaged in the business of buying salvaged or damaged mobile homes and trailers and repairing them for resale (Transcript of Testimony, Oct. 9, 1969, pp. 25-32). As revealed by the statement of affairs to the petition in bankruptcy, the bankrupt sold several trailers during this period. According to his testimony he bought four or five trailers at one time in August, 1968, which he planned to rent. He had the trailers assigned to Ashland

Recovery Real Estate. According to the bankrupt he used this bank account because he figured Morgan Driveways the transport company would give "us a better transport deal" (Transcript of Hearing, Dec. 10, 1969, pp. 44-45).

In October, 1969, the bankrupt submitted a bid of $1251 to Foremost Insurance Company of Grand Rapids, Michigan, on a 1969 Holiday Traveler Travel Trailer, which was being sold for its salvage value. The trailer was located at Ashland, Ohio (Transcript of Hearing, May 27, 1969, pp. 33-44; Transcript of Testimony, March 10, 1969, p. 76). The bankrupt was the high bidder. On November 15, 1968, Henry Clark, Salvage Manager for Foremost, had dinner with the bankrupt at a local Holiday Inn, and on that occasion executed a blank bill of sale to the trailer (Id. p. 35). The blank bill of sale was notarized by the bankrupt, who was or is a notary public (Id. p. 36, Exhibit N to the Transcript of May 27, 1969). The bankrupt did not pay for the trailer at the time he received the blank bill of sale. This was because by custom he was permitted to deduct any storage charges from the amount of the bid and remit Foremost the net amount, which could not be determined until the trailer was picked up and the storage paid (Transcript of May 27, 1969, pp. 33-34).

The bankrupt was unable to obtain the money to pay for the trailer. His brother agreed to borrow the money and honor the bid (Transcript of Hearing, Dec. 10, 1969, pp. 78-79). On or about November 21, 1968, the bankrupt typed the name of his brother, Clifford Enyart, in the blank bill of sale and gave it to him to take to the office of the Clerk of Greenup County to obtain a license for the trailer (Transcript of Testimony, May 27, 1969, pp. 34-37; Exhibit N). On November 21, 1968, the bankrupt notarized for his brother an affidavit supporting vehicle license application. This application states that the vehicle described therein (the space provided for describing the vehicle is blank) was brought into Kentucky

on November 21, 1969. Sometime after this date Harold Borders of Westwood picked up the trailer and brought it into Kentucky, and parked it in the bankrupt's back yard. It was parked there when the bankrupt filed bankruptcy on December 2, 1968 (Transcript of Hearing, May 27, 1969, pp. 30-34). The trailer was not listed as an asset in the bankruptcy petition. The transfer of title to the trailer to the brother on November 21, 1968, is not set out in the statement of affairs. Other trailer sales made in a similar manner within the year immediately preceding bankruptcy are also omitted from the statement of affairs (Transcript of Testimony, May 27, 1969 pp. 25-29).

On the date of bankruptcy, December 2, 1968, the bankrupt maintained a checking account in the Second National Bank of Ashland, Kentucky in the name of Ashland Recovery. The balance in the account on that date was 67¢. On December 6, 1968, the bankrupt wrote a check on this account for $348.16 payable to Holiday Rambler. (Exhibit M to Transcript of Testimony, March 10, 1969). This check was for the purchase of materials, outside metal, for repair of the 1969 Holiday Traveler Travel Trailer (Transcript of Testimony, May 27, 1969, p. 34).

On December 9, 1968, the bankrupt's brother, Clifford Enyart, borrowed the sum of $1250 from First and Peoples Bank of Russell, Kentucky, and in connection therewith executed a security agreement conveying to the bank a security interest in the 1969 Holiday Traveler Travel Trailer. This security agreement was lodged for record in the office of the Greenup County Clerk on December 11, 1968, and was duly noted on the certificate of registration and ownership which had been issued to Clifford Enyart when the vehicle was licensed on November 21, 1968 (Exhibit N of the Transcript of Testimony, March 10, 1969).

On December 9th or 10th, 1968, Clifford Enyart delivered to the bankrupt the proceeds of the loan from the

First and Peoples Bank of Russell, Kentucky, in the amount of $1250, plus an additional $275, or a total sum of $1525, which the bankrupt deposited to the account of Ashland Recovery in the Second National Bank of Ashland, Kentucky, on December 10, 1968. On the previous day, December 9, 1968, the bankrupt had written a check on this account to Foremost Insurance Company in the amount of $1171 in payment of the net balance due on his bid of the 1969 Holiday Traveler Travel Trailer after credit for an $80 storage bill which had apparently been paid when the trailer was picked up. The check to Foremost was paid by the bank on December 16, 1968; the check to Holiday Rambler in the amount of $348.16 cleared the bank on December 20, 1968. This left a balance of $5.97 in the Ashland Recovery Account (Exhibit M to the Transcript of Testimony, March 10, 1969) (Transcript of Testimony March 10, 1969, pp. 60-61).

On or about the date of bankruptcy the bankrupt had in his possession a 1955 Thunderbird, eight cylinder Ford automobile. This car is identified as a classic, a collector's item, with the value of approximately $2500 (Transcript of Testimony, May 27, 1969, pp. 62-64).

The bankrupt acquired the car from Benny Christian, another dealer who had owned it and owed Ashland Discount some money on it. (Transcript of Testimony, Oct. 9, 1969, pp. 36-37). The car was transferred from Benny Christian's floor plan to the bankrupt's floor plan with Ashland Discount Company in 1966 (Transcript of Testimony, Dec. 10, 1969, pp. 63-64). According to the bill of sale (Exhibit #5 to Transcript of Testimony, Dec. 10, 1969) which was executed by M. L. McNeal on March 12, 1966, the car was apparently acquired by the bankrupt on or about that date. The bankrupt kept the car approximately two years (Transcript of Testimony, Dec. 10, 1969, p. 64).

On February 24, 1968, the bankrupt, d/b/a Ashland Recovery, sold the 1955 Thunderbird automobile to Charles W. Meade, Jr., 1354 Florence St., Ashland, Kentucky, for $3295 plus tax of $40, making the total sales price $3335. As part of the purchase price Meade traded in a 1964 Chevrolet El Camino Pickup truck and gave Enyart a personal check for $1140 (Exhibit #4, Transcript of Testimony, Dec. 10, 1969). The car was transferred to Meade by inserting his name in the blank bill of sale executed by McNeal on March 12, 1966 (Exhibit #5, Transcript of Testimony, Dec. 10, 1969), (Transcript of Testimony, Dec. 10, 1969, pp. 69-74).

Before Meade took delivery of the car he became ill and died. His widow asked the bankrupt to sell the car (Transcript of Testimony, Dec. 10, 1969, pp. 64-65; Transcript of Testimony, Oct. 9, 1969, p. 38; Transcript of Testimony, May 27, 1969, pp. 67-69).

The bankrupt paid off the floor plan on the 1955 Thunderbird automobile on October 30, 1968 (Transcript of Testimony, May 27, 1969, pp. 70-71). The amount of the pay off was approximately $1300. The bankrupt retained the proceeds from the sale of the automobile on February 24, 1969, and used it to pay off a floor plan for another automobile and to pay rent (Transcript of Testimony, Dec. 10, 1969, p. 75). He paid off the floor plan to Ashland Discount Company eight months later on October 30, 1969, with funds from other sources. The source of the funds for this payment is not apparent from the record. In October or November 1969, the bankrupt delivered the 1955 Thunderbird automobile to Mrs. Meade (Transcript of Testimony, Oct. 9, 1969, p. 43).

On the date of bankruptcy the bankrupt was the owner of two Equitable Life Assurance Society Insurance policies Nos. 13777612 and 13777613 issued June 4, 1952, naming his children, Paula J. Enyart and Michael D. Enyart, as the insured parties. The policies had cash and dividend values

in the approximate total sum of $400 to $420 on the date of bankruptcy (Transcript of Testimony, Oct. 9, 1969, pp. 2-4). The bankrupt did not list these policies as assets in the schedules to the petition in bankruptcy (Id. p. 48). According to the bankrupt the fact these policies were in effect "slipped" his mind. When the daughter married he turned over to her the policy on her life with the understanding that she would pay the premium, and did likewise with the policy on the son when he got married (Transcript of Testimony, Dec. 10, 1969 pp, 62-63).

The bankrupt also failed to list as assets in the schedules to the bankruptcy petition several real mortgages which had been executed to Ashland Recovery or Ashland Recovery Service as additional security in connection with the sale of automobiles. The mortgages are filed as Exhibits C through L to the Transcript of Testimony taken March 10, 1969 (See also Transcript of Testimony, March 10, 1969, pp. 38-57). However, counsel for the trustee has reported to the Court, and it appears from the record, that several of these mortgages had been paid off prior to the date of bankruptcy, and that the mortgages were of no value to the estate (Transcript of Testimony, May 27, 1969, pp. 2-4).

The bankrupt admits he has not filed State and Federal income tax returns for the calendar years of 1965, 1966, 1967 and 1968 Transcript of Testimony, Oct. 9, 1969, pp. 14, 22-23). Neither is it clear that he filed State and Federal withholding tax returns for those years (Id pp. 5-6).

The bankrupt maintained three bank accounts: One in the name of Ashland Recovery Auto Sales in the First National Bank of Ironton, Ohio; one in the name of Ashland Recovery in the Second National Bank of Ashland, Kentucky, and a joint personal bank account with his wife in First and Peoples Bank of Russell, Kentucky. He used all these accounts rather indiscriminately in the con-

duct of his business affairs (Id. pp. 14-15). He has not produced all the canceled checks written on these accounts. (Transcript of Testimony, Oct. 9, 1969, p. 77).

The bankrupt maintained a ledger book of everything paid by check, by date, check number, payee and amount (Id. p. 15), but there are no entries in the ledger book for the eleven months of the year 1968 preceding bankruptcy (Id. p. 18).

The bankrupt testified he had receipt books showing his income from rental property, but the receipts had not been entered in a ledger book and had not been turned over to the trustee at the time of the initial hearing on the specifications of objections to discharge on October 9, 1969 (Id. pp. 20, 77-79). The bankrupt did not have any composite record of income, expenses for taxes and upkeep, depreciation or net profit from rental property (Id. pp. 20-21).

The bankrupt did not keep a copy of the bill of sale to each car he sold (Id. p. 21). He testified he had copies of the financing statements covering the cars he had sold during 1967 and 1968, but these documents had never been delivered to the trustee, or to the bankrupt's accountant (Id. pp. 21-22). There was no separate record of cash payments received by the bankrupt as down payments on the purchase of cars, other than as noted on the purchase order covering the sale of cars (Id. p. 23). The bankrupt did not keep ledger cards covering the sale of cars for which he was paid in installments but merely noted receipts on the sales slips (Id. p. 23). None of these records have been turned over to the trustee (Id. p. 24). The bankrupt had no record of the total amount of automobile sales for the years of 1966, 1967 and 1968 (Id. p. 25).

The bankrupt had no record of his gross income from trailer sales during 1968. His testimony was that he would have to reconstruct this from canceled checks and receipts on a month by month basis. However, he ad-

mitted that the income from trailer sales was used for living expenses and might not have gone into any checking account (Id. pp. 25-28). He did not have copies of the bills of sale to the trailers he had sold. There were apparently some written contracts of sale covering these transactions (Id. pp. 30-31). (Transcript of Testimony, Dec. 10, 1969, pp. 16-17).

The bankrupt kept no written inventory of the Model Raceway business at Russell, Kentucky (Id. p. 34). He produced no books or records relating to that business, other than the agreement filed as Exhibit O to the Transcript of Testimony of March 10, 1969, covering acquisition of the equipment for the business.

On one occasion the bankrupt collected $1200 or $1300 in full payment for an automobile which had been sold to a Mr. Cline. The purchase contract had been assigned to Ashland Discount. The bankrupt misappropriated this payment and paid it out in cash (Id. pp. 50-52).

The bankrupt had no record of how many cars financed with Ashland Discount Company with recourse had been repossessed and returned to his car lot during the years 1966, 1967 and 1968 (Id. pp. 53-54).

The bankrupt had no record of the amount of money he withdrew from the used car business for personal living expenses for the years of 1966, 1967 and 1968, and admittedly did not submit a list of the inventory of the car lot or other assets to the local taxing authorities for those years as required by local and taxing authorities for those years as required by local and state laws (Id pp. 56-57).

Counsel for the bankrupt conceded that information from the bankrupt's records had not been collated, and had been neglected for several years (Transcript of Testimony, Oct. 9, 1969, p. 767).

The objecting creditor concluded its proof in support of the specifications of objections to discharge at the

initial hearing on the objections to discharge held October 9, 1969. At the conclusion of the case for the objecting creditor the Court continued the hearing until December 10, 1969, to afford the bankrupt an opportunity to offer proof in response to the objections to discharge. On the latter date the bankrupt moved for a further continuance of the hearing on the grounds the accountant engaged by the bankrupt had not had sufficient time to put the bankrupt's books and records in order. This motion was overruled by the Court (Transcript of Testimony, Dec. 10, 1969, pp. 1-24).

The Court ruled that the objecting creditor had established to the satisfaction of the Court that there are reasonable grounds for believing the bankrupt had committed an act which would prevent his discharge in bankruptcy in that the bankrupt had failed to keep and preserve adequate books and records from which his financial condition and business transactions might be ascertained, and that the burden of proving he had not committed any such act was upon the bankrupt.

Basically, the explanation of the bankrupt for his failure to keep his records in good order is that he was trying to run a seven or eight man used car operation by himself because he had no money with which to hire any help due to his heavy financial commitment to the objecting creditor, so that there was simply no time to devote to the record keeping process (Transcript of Testimony, Dec. 10, 1969, pp. 27-33).

In 1965 the bankrupt employed a Mr. C. J. Rice to do his tax work and keep books. However, for some reason the bankrupt did not discover until 1967 that Mr. Rice was not performing this duty (Transcript of Testimony, Oct. 9, 1969, pp. 68-70).

On or about the date of the filing of the specifications of objections to discharge on July 31, 1969, the bankrupt

contacted a CPA about putting the bankrupt's books and records in order (Transcript of Testimony, Dec. 10, 1969, pp. 14-15). However, the CPA did not receive the bankrupt's records and actively begin working on them until 60 to 70 days later, after the initial hearing on the specifications of objections to discharge held October 9, 1969 (Id. p. 8).

According to the CPA, the bankrupt has the basic supporting records, such as canceled checks, deposit tickets, contract sales, copies of finance agreements, etc., necessary for compilation of his financial transactions (Id. p. 9). However, the CPA also found some of the transactions to be of a very unusual nature so that an ordinary layman would not be able to properly record them in books of account (Id. p. 9). The CPA was of the opinion that an interested creditor or trustee could not have ascertained the financial condition of the bankrupt from the records in the condition they were delivered to the CPA (Id. p. 16). Also, the record shows that the bankrupt made frequent withdrawals from the used car business in the form of cash, and the record is unclear as to how these withdrawals were accounted for (Id. pp. 53, 59-61).

Conclusions of Law:

The Court is of the opinion the specifications of objection to discharge based on the allegations that the bankrupt failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained should be, and hereby is, sustained. The objecting creditor established (1) that the bankrupt has not filed State and Federal income tax and withholding tax or local tax returns for several years; (2) that the bankrupt did not maintain a receipts ledger for any of the several businesses in which he was engaged; (3) that the disbursements ledger was not posted for the year 1968, although the bankrupt engaged in the used car business from January to June, 1968, operated a Model

Raceway and hobby shop from about March 5 until June, 1968, and engaged in the business of buying damaged trailers for resale from August, 1968, until the date of bankruptcy and thereafter; (4) that the bankrupt maintained at least three separate bank accounts which he drew upon rather indiscriminately in the transaction of his business affairs; (5) that the bankrupt made cash withdrawals from the used car business and realized cash from trailer sales which has not been adequately accounted for; (6) that the bankrupt misused funds realized from the sale of cars under floor plan to the objecting creditor; (7) that the bankrupt had retained possession of a substantial portion of his records and had made no real effort to put them in acceptable form prior to the initial hearing on the specifications of objections to discharge. On the basis of this showing the Court ruled there was reasonable grounds for believing the bankrupt had committed an act which would prevent his discharge in bankruptcy by failing to keep or preserve books or records from which his financial condition and business transactions might be ascertained and that the burden was upon the bankrupt to prove that he had kept and preserved such books and records.

The Court is of the opinion that the bankrupt has failed to meet this burden. Some eleven months after bankruptcy, after the specifications of objections to discharge had been pending more than 60 days, and after the initial hearing thereon, he delivered to a CPA an assortment of canceled checks, bank statements, car and trailer sales contracts and other documents relating to his business transactions covering an unspecified period of time. Some 30 days later at the continued hearing on the specifications of objections to discharge the CPA was uncertain as to whether these records were adequate because of the unusual nature of some of the transactions between the bankrupt and the objecting creditor relating to payment for floor planned cars. Further doubt as to the adequacy

of the record is raised by the fact that the bankrupt made frequent cash withdrawals to meet current living expenses.

The bankrupt is an experienced businessman. The inadequacy of his records cannot be justified on the grounds of ignorance.

As pointed out by the Court In re Romano, 196 F. Supp. 954, (1961), at page 958, a mass of unorganized, mixed and miscellaneous records could be as confusing as no records. The bankrupt cannot fulfill his burden by dumping a great volume of miscellaneous papers upon the trustee and leaving completely to the trustee the responsibility for fitting the jig-saw together and determining if all the pieces are there. Some organization of the voluminous records can be as much a part of record keeping as the existence of the records themselves.

The fact that the bankrupt has produced a miscellany of bank deposit slips, check stubs, canceled checks and like material does not necessarily establish that the bankrupt has accounted for receipts and disbursements from his business ventures in the years preceding bankruptcy. Hilliard v. Hollins, 290 F. 2d 263 (1961).

The Court is satisfied from the record herein that the bankrupt has not met the burden of proving that he kept or preserved books of account or records, from which his financial condition and business transactions might be ascertained, and that his failure to do so is not justified under the circumstances of this case.

Under the specification of objection to discharge based on allegations that within one year of bankruptcy the bankrupt transferred, removed, destroyed, or concealed property with intent to hinder, delay or defraud his creditors the objecting creditor alleges it refers the Court to "the divers real estate mortgages, a lawsuit thereon, the trailer purchase, the payment thereof and the Thunderbird automobile. Bankrupt has testified he had no insurance policies. Claimant herein has reasonable grounds to

believe that the bankrupt has two policies of life insurance, and that there is the concealment of the rental income."

The Court has found that the real estate mortgages obtained by the bankrupt as additional security in connection with the sale of automobiles were of little, if any, value.

The transfer of the 1969 Holiday Traveler Travel Trailer to the bankrupt's brother, Clifford Enyart, on or about November 21, 1968, cannot be said to have been with intent to hinder, delay or defraud creditors since the bankrupt received fair value for the trailer. However, the bankrupt is accountable for the proceeds from the sale which he received and disbursed after bankruptcy even though he may have done so on the advice of counsel. The Court rejects the contention that title to the trailer was never in the bankrupt, since this argument obtains validity only if the Court should condone violation of vehicle registration laws, and further because the evidence is clear that in making the sale the bankrupt was acting in his own behalf rather than as an agent of Foremost Insurance Company.

With respect to the transfer of the 1955 Ford Thunderbird automobile on February 24, 1968, to Charles W. Meade, this appears to have been a transfer for fair value in the ordinary course of business. It is true that the bankrupt misappropriated the proceeds of the sale and did not pay the objecting creditor for release of lien on the vehicle until October 30, 1968, after which he delivered the vehicle to the purchaser's wife as administrator of the deceased purchaser's estate. However, taken as a whole the facts are insufficient to support the conclusion that this transaction was made with intent to hinder, delay or defraud creditors.

The Court ruled that the objecting creditor had established a prima facie case with respect to the failure of the bankrupt to list two Equitable Life Assurance Society

Insurance policies as assets in the schedules to the bankruptcy petition, and that the burden was upon the bankrupt to explain his failure to do so. The Court is satisfied on the basis of the explanation of the bankrupt that the existence of the policies "slipped" his mind, that his failure to list the policies was due to oversight, and that the evidence is insufficient to support a conclusion that the bankrupt omitted listing the policies with intent to hinder, delay or defraud his creditors.

Although the Court has ruled that the bankrupt has failed to keep and preserve adequate books and records with respect to his income, including rental income, the evidence is not sufficient to support a conclusion that the bankrupt concealed the existence of the rental income. The existence of such income is revealed by Item 5 of the statement of affairs to the petition in bankruptcy.

WHEREFORE: The Court is of the opinion that the specifications of objection to discharge of the bankrupt based on the allegation that within a year of bankruptcy he transferred, removed, destroyed, or concealed property with intent to hinder, delay or defraud his creditors should be, and hereby is, overruled.

The specification of objection to discharge based upon the allegation that the bankrupt has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities likewise should be, and hereby is, overruled. This specification is based on the transaction with respect to the 1955 Ford Thunderbird automobile. That transaction has been explained to the satisfaction of the Court.

WHEREFORE: The Court is of the opinion that the bankrupt should be, and hereby is, denied a discharge in bankruptcy in this proceeding for his failure to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained.

IT IS ORDERED that copies of this order be served by mail upon the parties shown below.

At Lexington, Kentucky, this November 5th, 1970.

/s/ JOE LEE
Referee in Bankruptcy

Copies to:

Michael Dowling
Attorney for Bankrupt

Joe R. Massey, Jr.
Attorney for Objecting Creditor

John Simpson
Trustee

James E. Adkins
Attorney for the Trustee

It is ordered that copies of this Finding of Facts, Conclusions of Law, and Orders be served by mail upon the parties listed below.

Dated at Lexington, Kentucky this the 31st day of December, 1970.

On its own motion the Court extends the time to appeal from this order until January 20, 1971.

/s/ JOE LEE
Referee in Bankruptcy

COPIES SERVED BY MAIL UPON:

Michael Dowling
Attorney for Bankrupt

Joe R. Massey, Jr.
Attorney for the Objecting Creditor

John Simpson
Trustee

James E. Adkins
Attorney for the Trustee

[CAPTION]

MEMORANDUM OPINION—(Filed July 6, 1971)

This matter is before the Court on a Petition for Review, pursuant to 11 U.S.C. 67(c) of an Order of the Referee in Bankruptcy, denying the bankrupt a discharge in bankruptcy and on a similar petition for review of Orders of the Referee ordering the bankrupt to pay over to the Trustee in Bankruptcy the sum of $1,525.00 representing proceeds received by the bankrupt after bankruptcy from the sale prior to bankruptcy of a 1969 Holiday Traveler travel trailer and provisionally allowing the claim of Ashland Discount Company as a secured claim in the amount of $64,883.62, subject to the requirement that said creditor marshall the security disclaimed by the Trustee in Bankruptcy as a prerequisite to receiving any dividend on the claim.

The Referee's Order denying the bankrupt a discharge in bankruptcy was the result of specifications of objections to discharge filed by Ashland Discount Company and was grounded upon the failure of the bankrupt to keep or preserve books of account or records from which his financial condition and business transactions might be ascertained. 11 U.S.C. 32(c). From the record, including the transcripts of testimony given in five separate hearings held in connection with the subject bankruptcy, it appears that prior to bankruptcy the bankrupt was engaged primarily in the used automobile business. Most of his inventory was "floor planned" with the objecting creditor, and many of his dealings, both with the creditor and which his customers, were done in transactions of unorthodox form. A certified public accountant testified, in effect, the bankrupt had not kept books in the ordinary sense; that the

bankrupt's records were insufficient, particularly in view of the unorthodox form of some of the transactions involving the bankrupt, for an outsider or a layman to ascertain his financial condition or ascertain his transactions; but that it would probably be possible to make a reconstruction of the bankrupt's affairs if Ashland Discount Company's records were made available to the bankrupt (Tr., Dec. 10, 1969, pp. 14-25). While it is true that 11 U.S.C. 32(c) does not require that books or records be kept in any particular fashion, the statute does contemplate that the bankrupt, to be entitled to a discharge in bankruptcy, must maintain such records that his financial condition may be reasonably ascertained and from which his business transactions may be traced for a reasonable period into the past. While the requirement may be relaxed upon a showing of sufficient justification, it is obvious that in the instant case the bankrupt has failed to keep adequate records of his affairs, or to offer a reasonable justification for his failure to do so, and that the denial of a discharge in bankruptcy to the bankrupt was entirely warranted. *Burchett* v. *Myers*, 202 F. 2d 920 (9th Cir. 1953).

The Referee's Order requiring the bankrupt to pay over the sum of $1,525.00 to the Trustee in Bankruptcy results from a transaction involving the sale of a 1969 Holiday Traveler travel trailer. It is apparently undisputed that prior to bankruptcy the bankrupt bid on the trailer and was given a bill of sale thereto, executed in blank by the seller. Subsequent to bankruptcy, the bankrupt's brother, whose name had been inserted prior to bankruptcy in the bill of sale, borrowed sufficient funds to purchase the trailer, and paid the money to the bankrupt. Although the bankrupt contends that his brother had merely honored the bankrupt's bid for him and that the trailer never really belonged to the bankrupt, it appears that the bankrupt had

regularly utilized the same scheme in the conduct of his used car business, and, in any event, it is clear that on the date of bankruptcy the bankrupt had physical possession of the trailer and was, at that time, either the owner of the trailer or entitled to the proceeds from the sale thereof. In either event the Trustee would be entitled to the trailer or the proceeds from the sale thereof received by the bankrupt subsequent to the date of bankruptcy. Having received and dispersed said proceeds subsequent to bankruptcy, the bankrupt is now accountable for same to the Trustee in Bankruptcy.

The Bankrupt's contention concerning the allowance of the claim of Ashland Discount Company as a secured claim is that such allowance defeats the right of the bankrupt to contest the indebtedness giving rise to said claim. Inasmuch as General Order 21(6) of the General Orders in Bankruptcy provides specifically and in detail that the bankrupt can petition for the reconsideration of the allowance of a claim against the bankruptcy estate and is entitled to call witnesses and be heard in connection with such a petition, it is clear that the bankrupt has not been prejudiced by the provisional allowance of the claim of Ashland Discount Company as a secured claim.

For the foregoing reasons, the Order of the Referee in Bankruptcy sustaining an objection to the discharge of the bankrupt and denying the bankrupt a discharge in bankruptcy, the Order of the Referee in Bankruptcy ordering the bankrupt to pay over to the Trustee in Bankruptcy the sum of $1,525.00 representing the proceeds received by the bankrupt subsequent to bankruptcy from the sale of a 1969 Holiday Traveler travel trailer, and the Order of the Referee in Bankruptcy provisionally allowing the claim of Ashland Discount Company as a secured claim in the amount of $64,883.62, should be approved and confirmed.

An Order in conformity herewith will be this day entered.

This the 6th day of July, 1971.

/s/ BERNARD T. MOYNAHAN, JR., *Judge*

cc: Joe Lee
Michael Dowling mailed 7/6/71
mpe

Before: WEICK and MILLER, Circuit Judges, and RUBIN*, District Judge.

Paul E. Enyart, who had voluntarily petitioned for a discharge in bankruptcy, appeals from a district court order affirming a referee's order denying such discharge. Discharge was denied pursuant to Section 14(c)(2) of the Bankruptcy Act, 11 U.S.C.A. §32(c)(2). The referee determined that Enyart failed to keep books of account or records from which his financial condition and business transactions might be ascertained, and further determined that, under all of the circumstances of the case, said failure was not justified. Enyart objected to and now appeals from those determinations. Enyart also objects to an order of the referee finding him accountable to the bankrupt estate for the proceeds resulting from a transaction involving the sale of a travel trailer which were disbursed to appellant's brother after the filing of the petition in bankruptcy.

The referee concluded that Enyart failed to file either State or Federal income tax and withholding tax or local tax returns for several years, did not maintain a receipts ledger for any of the several businesses in which he was engaged; maintained three separate bank accounts which he used indiscriminiately for business and personal purposes; and made no real effort to put his records in an

*Honorable Carl B. Rubin, United States District Judge for the Southern District of Ohio, sitting by designation.

acceptable form prior to the initial hearing on the specifications of objections to discharge. After five hearings, the referee concluded that Enyart had failed to carry his burden, under Section 14(c)(2) of the Bankruptcy Act, of showing that his financial condition and business transactions might be ascertained. The applicable principle is that while a bankrupt's books need not be in perfect order nor follow any particular accounting system, they must be susceptible to reconstruction by a competent accountant without expending unlimited amounts of time or funds. See, *Hilliard* v. *Hollins*, 290 F. 2d 263 (6th Cir. 1961); *Noroian* v. *Hern*, 422 F. 2d 1092 (9th Cir. 1970); *In re Romano*, 196 F. Supp. 954 (E.D. Tenn. S.D. 1961).

The record fully supports the referee's conclusions and the district court's affirmance. It is well established in this Circuit that "concurrent findings of the Referee in Bankruptcy and the district judge are not to be set aside, except upon clear demonstration of mistake." *Cunningham* v. *Elco Distributors*, 189 F. 2d 87 (6th Cir. 1951); *Hilliard* v. *Hollins, supra*, at 265; *Morehead* v. *Greenville Supply Company*, 439 F. 2d 962 (6th Cir. 1971); *In re Newman*, 92 F. 2d 108 (6th Cir. 1938).

We find neither clear mistake nor abuse of discretion in the action of the Referee and the district judge as to either of the asserted grounds of appeal.

The judgment of the district court is therefore affirmed.

Entered by order of the Court.

/s/ JAMES A. HIGGINS, *Clerk*